UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANCISCO GARCIA individually, on behalf of his minor child SILVARIO GARCIA and all others similarly situated	Case No. 1:07-CV-2363 CC
Plaintiff(s),	DECLARATION OF BEN SMITH IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)
vs.	
MICROSOFT CORPORATION	
Defendant.	

DECLARATION OF BEN SMITH

I , Ben Smith, declare as follows:

1. I am over 21 years of age and am competent to give this declaration. Except where otherwise indicated, I have personal knowledge of the following facts, all of which I believe to be true and correct.

2. I am Group Program Manager, LIVE Services at Microsoft Corporation ("Microsoft"), a position I assumed in December 2006. As Group Program Manager, my responsibilities include design, implementation and

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management of technical and business policies and the management of the Xbox user community.

3. In the ordinary and regular course of Microsoft's business, I have access to, and use, the agreements Microsoft enters into with subscribers to Xbox LIVE, and account records relating to Xbox LIVE accounts.

4. I have examined the Complaint filed in this litigation in the Superior Court of Fulton County Georgia on August 23, 2007 in File No. 2007CV138898, in which the Plaintiff, Francisco Garcia, alleges in paragraph 8 that on or about October 2005, an Xbox LIVE account was opened using his debit card.

5. Microsoft's Xbox LIVE account records show that an account was opened in the name of Francisco Garcia, of 4101 Walton Way, Roswell, Georgia 30076, on June 28, 2005, and assigned an account ID of 79772161. A true and correct copy of account records for account 79772161 is attached hereto as Exhibit A. These records were created in the ordinary course of Microsoft's business on or about the dates that they bear. It is Microsoft's regular practice to create records such as these when Xbox LIVE accounts are opened and when subsequent transactions affecting those accounts occur.

6. As shown in Exhibit A, account 79772161 was originally opened on June 28, 2005, and renewed on September 28, 2005 with a payment of $49.99, which is the normal fee charged for one year of Xbox LIVE service. Exhibit A

also shows that account 79772161 was renewed one year later, on September 28, 2006, with a second payment of $49.99, and that the account was canceled on October 4, 2006 and a $49.99 refund made as shown under the event name of "OFFSET_LINEITEM."

7. In order to open an Xbox LIVE account, a subscriber must agree to the Xbox LIVE Terms of Use during an online registration process. During that process, the Xbox LIVE Terms of Use are presented, and the subscriber, by clicking on the appropriate onscreen box ("Accept" or "Decline"), must specify whether he or she agrees to the Terms of Use. If the subscriber does not specify that he or she agrees to the Terms of Use by clicking "Accept", the subscriber will be unable to open an Xbox LIVE account.

8. A true and correct copy of the Xbox LIVE Terms of Use in effect when account 79772161 was opened on June 28, 2005, and which were still in effect on September 29, 2005 when account 79772161 was renewed, is attached hereto as Exhibit B. Section 1 of the Terms of Use attached as Exhibit B included the following requirement as a condition of opening an Xbox LIVE account:

> You represent that you are at least 18 years old, and all information that you submit is correct.

Section 16 of the Terms of Use attached as Exhibit B contains the following agreement to litigate any disputes relating to the Xbox LIVE service in King County, Washington:

> 16. CHOICE OF LAW AND LOCATION FOR RESOLVING DISPUTES. . . . You irrevocably consent to the exclusive jurisdiction of and venue of federal or state courts in King County, Washington, USA in all disputes arising out of or relating to the use of the Service.

9. A true and correct copy of the Xbox LIVE Terms of Use in effect when account 79772161 was renewed on September 29, 2006 is attached hereto as Exhibit C. Section 1 of the Terms of Use attached as Exhibit C included the following requirement as a condition of opening an Xbox LIVE account:

> You must be at least 18 years old and have attained the age of majority in the province, state or country in which you live. The facts you give us must be complete and correct.

Section 19 of the Terms of Use attached as Exhibit C contains the following agreement to litigate any disputes relating to the Xbox LIVE service in King County, Washington:

19. CHOICE OF LAW AND LOCATION FOR RESOLVING DISPUTES. . . . If this contract is with Microsoft Corporation, you irrevocably consent to the exclusive jurisdiction of and venue of federal or state courts in King County, Washington, USA for all disputes relating to this contract or the Service.

10. Exhibits A, B, and C are materials kept in the course of regularly conducted business activity by Microsoft, and it is the regular practice of Microsoft to record and maintain these materials.

11. Nearly all of Microsoft's managerial and business decisions and practices relating to the matters alleged in the Complaint were made in King County, Washington, and nearly all documentation of those decisions and practices is located in King County, Washington.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2007.

Ben Smith